

IN THE HIGH COURT AT CALCUTTA**Criminal Revisional Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****C.R.R. No. - 20 of 2017****With****IA No. CRAN 2 of 2017 (Old No. CRAN 5014 of 2017)****IN THE MATTER OF****Saidur Rahaman Molla.****Vs.****State of West Bengal & Anr.**

**For the petitioner : Mr. Debabrata Acharyya, Adv.,
Mr. Sital Samanta, Adv.,
Ms. Debjani Saha, Adv.**

**For the State : Mr. Anwwar Hossain, Adv.,
Mr. Mirza Firoz Ahmed Begg, Adv.**

Judgment on : 10.01.2023

Subhendu Samanta, J.

This is an application u/s 401 read with section 482 of the Criminal Procedure Code against an order dated 2nd December 2016 passed by Learned Additional Sessions Judge, Uluberia, Howrah in ST No.- 133 of 2013 arising out of Shyampur Police Station Case No.- 330 of 2010 dated 27.11.2010 alleging commission of offence punishable u/s 417/376 of IPC.

In a nutshell, the case of the petitioner is that the present opposite party No. 2 lodged a petition of complaint with the O.C Shyampur P.S. on the basis of which Shyampur P.S Case No. 330 of 2010 dated 27.11.2010

u/s 417, 376 of IPC was initiated. It was alleged in the said complaint that an intimacy was developed between the petitioner and the OP No. 2 and it was continued for one and half years; the petitioner cohabited with the opposite party No. 2 with a promise to marry her. The complainant became pregnant and the said fact was informed to the family members of the petitioner. Initially the petitioner and his family member agreed the marriage proposal but subsequently they denied to marry.

After completion of investigation police submitted charge sheet u/s 417,376 and 34 IPC against the petitioner and 05 others.

The accused persons except the present petitioner preferred one criminal revisional application before this Hon'ble court and by virtue of order of this court passed in CRR No. 2665 of 2014; they have been discharged from the proceeding.

During the continuation of the investigation a male baby was born and the DNA test was conducted by the prosecution to ascertain the parentage of the male baby. The forensic examination report has reached and the police submitted the supplementary charge sheet with that the forensic report to the Learned Additional Chief Judicial Magistrate Uluberia. The report of the DNA test indicated that the present petitioner is not biological father of the male baby but he is the son of OP No. 2.

It is the case of the petitioner that the allegation of the complainant that she conceived due to the sexual relationship with the petitioner is false and he is liable to be discharged from this case. His prayer was turned down by the Learned Additional Sessions Judge; hence, this revision.

Learned Advocate for the petitioner submitted before this court that the impugned order passed by the Learned Sessions Judge, is illegal and improper. Learned court below has failed to consider the CFSL report which completely erases the suspicion about the guilt of the petitioner. The charge against the present petitioner is baseless and he is liable to be discharged. He further argued that at this juncture the report of CFSL cannot be denied as it is the document of the prosecution and the prosecution has submitted

supplementary charge sheet with this report. This is the argument of the Learned Advocate for the petitioner that the trial cannot be concluded in conviction because the benefit of doubt is always with the accused.

In support of his contention Learned Advocate for the petitioner submitted that the Hon'ble Supreme Court in several judgments as formulated that the cohabitation with the complainant and the accused with a promise to marry does not constitute an offence punishable u/s 376 IPC. He further argued that Hon'ble Supreme Court in the case of **Pramod Suryabhan Pawar Vs. The State of Maharashtra & Anr.** and followed by **Shambhu Kharwar Vs. The State of Uttar Pradesh & Anr.** specifically formulated that no offence u/s 376 IPC is occurred when the victim engaged with sexual relationship with the accused with a promise of marriage. In those cases the relationship between the parties was purely of consensual nature.

Learned Advocate for the petitioner also cited a decision reported in **1979 SCC (cri) 609** on the principle regarding the duty of the court at the time of framing of charge.

I have perused the citations.

In the case of **Pramod Suryabhan Pawar** FIR was registered u/s 376/417, 504 and 506 (2) of IPC and other sections of SCST Act 2015. The fact of the case was that the complainant and the accused was intimated to each other since long time and with the promise of marriage they cohabit with each other several times. They also visit Dr. to ascertain whether the complainant was pregnant or not. They travelled together long distance. They stayed several places jointly for multiple times. Thereafter, disputes between them were cropped up and the complainant lodged the FIR. In paragraph 18 and 20 **Pramod Suryabhan Pawar's** case Hon'ble Supreme Court has held that –

18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must

involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.

20. *The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant’s failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a dispute matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she*

was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complaint's statements are accepted in totality, no offence under Section 375 of the IPC has occurred.

In **Shambhu Kharwar's** (supra) Hon'ble Supreme Court on the same type of FIR in Para 12 and 13 has held that –

12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge- sheet are correct as they stand, an offence punishable under Section 376 IPC was made out. Admittedly, the appellant and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent.

13. In this backdrop and taking the allegations in the complaint as they stand, it is impossible to find in the FIR or in the charge-sheet, the essential ingredients of an offence under Section 376 IPC. The crucial issue which is to be considered is whether the allegations indicate that the appellant had given a

promise to the second respondent to marry which at the inception was false and on the basis of which the second respondent was induced into a sexual relationship. Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under Section 375 IPC are absent. The relationship between the parties was purely of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent.

Learned Advocate appearing on behalf of the State raise strong objection and submitted before this court that the present petitioner is the prime accused of the instant case. The charge sheet has been submitted after completion of investigation. The victim gave her statements to the magistrate and her statement was recorded u/s 164 Cr.P.C.. The statement available witnesses were recorded u/s 161Cr.P.C.

The materials suggest the involvement of the present petitioner in the alleged offence. The CFSL report regarding DNA test of the baby and the present petitioner is only a piece of evidence which cannot be considered at this stage to be true. Before submission of the DNA report the police has already submitted a charge sheet.

At this juncture all the materials collected by the I.O during the course of investigation cannot be denied before completion of trial. He again argued that in several case the different High Court is of opinion that the report of DNA cannot be considered to be the gospel truth and the accused cannot be discharged from the case. In support of his contention he cited the decision of Hon'ble Bombay High Court passed in Criminal Appeal No. 111 of 2020 on 09.09.2021 between **Dasrath Vs. State of Maharashtra**,

The Judgment of Hon'ble Karnataka High Court passed in **Criminal Petition No. 6789 of 2022 on 15th September 2022** and Judgment of Hon'ble Tripura High Court passed in **Criminal Appeal (J) 15 of 2019 between Rajiv Sharma Vs. State of Tripura.**

Para 11 of the Hon'ble Karnataka High Court Judgment read as follows-

11. It is no doubt true that DNA analysis has emerged in favour of the petitioner for him not being the biological father. That would not, in the considered view of this Court, absolve the petitioner in entirety for the offences so alleged. Paternity may have been in doubt due to the analysis. The alleged act has not at all happened cannot be the inference that can be drawn due to a DNA sample coming in favour of the petitioner. Even otherwise, the DNA sample report that is given by the analyst is also be confirmed by way of evidence. Mere production of DNA sample report before this Court would not mean that it has to be taken as gospel truth without examination or cross-examination of the doctor who has rendered such opinion.

Paragraph 22 of the **Hon'ble Maharsthra High Court in Dasrath Vs. State of Maharsthra** case is read as follows –

22. In the case of State of Gujrat Vs. Jayantibhai Somabhai Khant in criminal appeal No. 224 of 2012 the prosecutrix and her parents did not support the case of prosecution. But, the accused was convicted on the basis of DNA report. In view of the said

facts, it was held therein that mere establishment of identity of father of foetus in any case would not sufficient to record the conviction of the accused for rape and gang – rape under Section 363, 366 and 376 of the Indian Penal Code. But, in the present case, the victim and informant have supported the case of the prosecution. Evidence of victim was supported by the medical evidence. Therefore, in view of the ratio laid down in the case of Sunil (Supra) it can be said that the other material brought on record by the prosecution can be considered. Though, the DNA report exonerated the appellant, but there is sufficient evidence on record to hold that the appellant had committed rape on victim. It is pertinent to note here that the marriage of the victim was solemnized on 10.06.2018 the victim had gone for cohabitation with her husband at her matrimonial home. On the next day the husband of the victim noticed that the victim was carrying pregnancy. Therefore, she was sent to parental house on 23.06.2018 and on the same day, in pursuance of information given by the victim, her mother lodged the FIR. The prosecution has proved that the victim is a child within the meaning of Section 2(d) of the POCSO Act. Her evidence is unblemished. Therefore, there is no need to discard it.

Heard, the learned Advocates perused the charge sheet also perused DNA test report forwarded with the supplementary charge sheet. The DNA report is supporting the case of the petitioner. The FIR stated the accused cohabit the complainant several times on the pretext of marriage. Before the

report of DNA can reach, the police has conducted the investigation and sufficient materials were collected. The Judgment of Hon'ble Supreme Court passed in **Shambhu Kharwar** and **Pramod Suryabhan Pawar** is on the basis of same set of facts stated in their FIR. The Cases of **Shambhu Kharwar** and **Pramod Suryabhan Pawar** are totally different to the aspect and that the complainant of both the cases were matured and they were in agreement and consent with each other to cohabite due to love and affairs between them. The relationship between the complainant and the accused continued for a long period and with their active consent and participation, continued their sexual relationship. Thus considering peculiar situations of facts and circumstances of the FIR of those cases Hon'ble Supreme Court was a view with the relationship between the complainant and the accused was consensual in nature; in those cases it was the guideline of the Hon'ble Apex Court that the allegation u/s 376 IPC cannot be proved. In the present case the consent of the victim that is OP No. 2 was obtained with the misrepresentation to marry her. The particular facts and circumstances of this case suggests that the sexual relationship between the parties would not happen if the victim was not influenced by promise of marriage by the Accused/Petitioner. Section 90 of IPC defined consent of any person under the fear or misconception. In this case the consent of the victim obtained under misconception of marriage if there were no such mis-representation the sexual relationship would not be occurred.

The principles laid down in **“Shambhu Kharwar”** case is not applicable in this case because the facts and circumstances of the cited case is completely different. The element of mutual consent understanding the situation by the parties, consequential effect of sexual relationship and knowledge thereof by the parties.

In considering the facts of this case there are several materials collected by the I.O. during the course of investigation; and they are standing against the petitioner including the statement of the victim recorded u/s 164 Cr.P.C. Mere report of the DNA test, which may support the case of defence but it's weighted cannot be measured at this stage.

If the case of the petitioner is to be considered then this court has to measure the probative value of the CFSL test report is one side; and materials collected by the I.O. during the course of investigation of this case in other side. By that way this court has to come to a conclusion that the value of evidence of petitioner is more weighty. In a word this court as to conduct a mini trial at this stage when the date of trial has already been fixed by the Learned Sessions Judge. The Revisional Power of this court does not permit such roving enquiry.

Considering the entire aspect, the order of the Learned Court below rejecting the prayer of the petitioner, appears to be justified.

Thus I find no merit to entertain the instant criminal revision and it is liable to be dismissed.

In conclusion the criminal revision is dismissed.

It is not necessary to interfere with the impugned order passed by the Learned Sessions Judge. CRR is disposed of.

Any pending CRAN applications if any is also disposed.

Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)